

DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

SENATE NATURAL RESOURCES

SENATE BILL NO. 1

DATE Jan. 19, 2009

BILL NO. SB94

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TO: Senator Debby Barrett
Senate Natural Resources Committee

CC: Chairman Gebhardt, Senate Natural Resources Committee
Senator Larry Jent

FROM: John Tubbs, Administrator
Water Resources Division, DNRC

RE: Removal of Reference to Historic Beneficial Use in SB 94

DATE: January 16, 2009

Pursuant to your request after the hearing on Senate Bill (SB) 94 on January 14, 2009, the Department provides the following explanation for the proposal to remove the reference to "historic beneficial use" on page 2, line 12 of SB 94. The short answer is that the Department lacks the authority in this context to examine the "historic beneficial use" of existing water rights which are part of the adjudication before the Montana Water Court and such a determination could affect the water rights of many water right holders who are not party to the permit application before the Department.

The language at issue is found in §85-2-360(5), MCA:

(5) For the purposes of 85-2-360 through 85-2-362, the prediction of net depletion does not mean that an adverse effect on a prior appropriator will occur or if an adverse effect does occur that the entire amount of net depletion is the cause of the adverse effect. A determination of whether or not there is an adverse effect on a prior appropriator as the result of a new appropriation right is a determination that must be made by the department based on the amount, location, and duration of the amount of net depletion that causes the adverse effect relative to the historic beneficial use of the appropriation right that may be adversely affected.

(Emphasis added). Claims for water rights with priority dates prior to July 1, 1973 ("existing water rights"), are before the Montana Water Court for adjudication. E.g., §85-2-212, -224, -231, and -234, MCA. This means that the Water Court will determine the elements of these claims as they existed prior to July 1, 1973. One cannot change a water

right after that date without going through the change process before the Department §85-2-402, MCA.

For the purposes of determining the criteria for issuance of a permit, including adverse effect to all senior appropriators, the Department will look to the Claims as they exist before the Water Court to determine how those rights can be currently exercised. The Claims are part of the Department's centralized database. The Department is charged with maintaining the centralized database for water rights in the State. §85-2-112(3), MCA. The Department does not investigate the factual historic basis for individual Claims under the permitting statutes because a determination as to how these Claims can be currently exercised is within the authority of the Water Court.

An applicant for a new water right permit must prove lack of adverse effect to all senior appropriators, not simply those that object to the application and participate in the permit proceeding. §85-2-311(1)(b), MCA. The adverse effect analysis can involve many water rights. Even if the Department had the authority to investigate the Water Right Claims for the purpose of determining how they could be currently exercised, the investigation would be factually intensive for each right and could affect the water rights of many people who are not party to the proceeding. It is a fundamental principle that beneficial use of a water right is the basis, the measure and the limit of a water right. An investigation by the Department during the permit proceeding could result in evidence that argues that water rights of parties not part of the permit proceeding, and whose Claims are being adjudicated before the Water Court, should be reduced. Importantly, this evidence and analysis could be developed without the water right holders' participation.

For the above reasons, SB 94 proposes to strike "historic beneficial use," and an applicant and the Department would continue to evaluate the water rights of senior appropriators in permit proceedings based on the records in the Department's centralized database.